EDWARDS ANGELL PALMER & DODGE LLP

1255 23rd Street, NW Eighth Floor Washington, DC 20037 202.939.7900 *fax* 202.745.0916 eapdlaw.com

Arthur H. Harding
202.939.7900
fax 202.745.0916
aharding@eapdlaw.com

February 10, 2011

VIA ECFS ***EX PARTE NOTICE***

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 10-215

Dear Ms. Dortch:

On February 9, 2011, Cristina Pauzé, Vice President, Federal Regulatory Affairs of Time Warner Cable Inc. ("TWC"), Michael Quinn, Vice President and Assistant Chief Counsel, Litigation of TWC, Craig Gilley of Edwards Angell Palmer & Dodge LLP, outside counsel to TWC, and the undersigned met with the following Media Bureau and Office of General Counsel staff to discuss TWC's petition for declaratory ruling regarding negative option billing restrictions in the above-referenced proceeding: Michelle Carey, Nancy Murphy, Mary Beth Murphy, John Norton, Sonia Mickle, Julie Veach, Jim Carr, Jacob Lewis, Susan Aaron, and Nandan Joshi. The issues discussed at this meeting are set forth on the attached summary. At the request of Ms. Veach, we also have attached a copy of the Memorandum in Opposition to Plaintiffs' Motion for Class Certification filed by TWC in the underlying state court proceeding on January 18, 2011.

Please feel free to contact me with any questions regarding this letter.

Respectfully submitted,

Arthur H. Harding

Arthur H. Harding
Counsel for Time Warner Cable Inc.

Attachments

cc: Michelle Carey (via e-mail)
Nancy Murphy (via e-mail)
Mary Beth Murphy (via e-mail)
John Norton (via e-mail)
Sonia Mickle (via e-mail)
Julie Veach (via e-mail)
Jim Carr (via e-mail)
Jacob Lewis (via e-mail)
Susan Aaron (via e-mail)
Nandan Joshi (via e-mail)

DC 287450.1

Time Warner Cable's Petition for Declaratory Ruling Regarding the Negative Option Billing Restriction (MB Docket No. 10-215)

Time Warner Cable's ("TWC") Petition for Declaratory Ruling seeks Commission guidance on the proper interpretation of Section 623(f), the Negative Option Billing Restriction, which prohibits a cable operator from charging a subscriber for any service or equipment that the subscriber has not "affirmatively requested by name."

The Commission Has Consistently Found The "Affirmatively Requested By Name" Language In Section 623(f) To Be Ambiguous

- The Commission's expertise regarding the proper interpretation of Section 623(f) is necessary in light of its determination that the statute is ambiguous and open to multiple interpretations.
    - A statute is unambiguous if its language reveals unmistakably that "Congress has spoken on the precise question at issue and its intent is clear" as to the provision's meaning and application. *Time Warner Cable v. Doyle*, 66 F.3d 867, 876 (7th Cir. 1995) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).
    - By contrast, a statute is deemed "ambiguous" whenever "it can be read more than one way," *AFL-CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003), and is "subject to multiple constructions" and "'can give rise to two or more different meanings'" such that "it is not instantaneously apparent" whether particular conduct in a given specific factual scenario complies with or violates the statute. *Alliance for Community Media v. F.C.C.*, 529 F.3d 763, 777-78 (6th Cir. 2008) (quoting *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004)).
- While Congress specified that a subscriber's silence cannot be interpreted as an affirmative request by name for services or equipment, it did not otherwise describe what would constitute an affirmative request by name.
- Given this ambiguity, the Commission has properly elaborated upon the statutory language.
    - The Commission's rulemaking orders properly clarified that an affirmative request can be made orally, in writing, or electronically.
    - The Commission has continued to expand upon and further clarify the scope of Section 623(f) prohibition in a variety of contexts, including clarifying on several occasions that the statutory phrase "affirmative request by name" is synonymous with affirmative "consent" or "assent."
    - The Commission also implicitly acknowledged the ambiguity inherent in Section 623(f) when, subsequent to its initial order implementing the statutory provision, it promulgated Section 76.981(b), which specifies that changes made as a result of unbundling do not violate the affirmative request by name requirement even though the statute could be read in that manner.

- The Seventh Circuit's decision in *Doyle* confirms that Section 623(f) is open to interpretation, holding that it is impossible to "conclude that the intent of the Congress is so unambiguously stated as to preclude further interpretation by the agency charged with the administration of the statute."

The Commission's Interpretation Of Section 623(f) Is Entitled To Substantial Deference

- *Chevron* unequivocally established the principle that the interpretation of an agency charged by Congress with administering a statute should be given "controlling weight" and is entitled to substantial deference as long as the interpretation is based upon a permissible reading of the statute. *Chevron*, 467 U.S. at 842-43.

- In applying *Chevron* analysis in the *Doyle* case, the Seventh Circuit concluded that the Commission's interpretation of Section 623(f) is entitled to great deference. *Doyle*, 66 F.3d 867 at 877.

- The D.C. Circuit Court of Appeals likewise has granted substantial deference to Commission interpretations of various other provisions of the 1992 Cable Act where the statute was silent or ambiguous (e.g., rate and basic service tier regulation). *See Time Warner Entm't Co., L.P. v. F.C.C.*, 56 F.3d 151 (D.C. Cir. 1995).

TWC Is Asking The Commission To Confirm Its Practical, Common-Sense Approach To Compliance With Section 623(c)

- As noted by the author of this section, the intent of this provision was to "make it clear that Congress does not want the public duped into paying for any cable service program, service, equipment or anything else, without ***consciously knowing*** they are purchasing that service and ***making a decision*** to do so." 138 Cong. Rec. S568 (daily ed. Jan. 29, 1992) (statement of Sen. Gorton) (emphasis added).

- The FCC has confirmed this legislative purpose, finding that "the concern of Section 3(f) [codified as 47 U.S.C. § 543(f)] as a consumer protection mechanism is that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to charges for services ***that appear on a bill that are not desired and for which no request has been made***." *Warner Cable Communications, Milwaukee, Wisconsin,* 10 FCC Rcd 2103, ¶ 13 (Cab. Serv. Bur. 1995) (emphasis added).

- In sum, TWC is not asking the FCC to evaluate the countless iterations of the communications that might take place between a customer and a cable operator.

- Rather, TWC merely requests the Commission to reaffirm its long-standing general framework that properly declines to elevate form over substance.

- As long as a customer has knowingly expressed the desire to receive cable services or equipment, regardless of the format or terminology used in placing the order, there is no negative option.

213178_1

H. JOSEPH ESCHER III (No. 85551)
FRANCE JAFFE (No. 217471)
DECHERT LLP
One Maritime Plaza, Suite 2300
San Francisco, California 94111-3513
Telephone: 415.262.4500
Facsimile: 415.262.4555

STEVEN B. WEISBURD (No. 171490)
DECHERT LLP
300 West 6th Street, Suite 2010
Austin, Texas 78701-3901
Telephone: 512.394.3000
Facsimile: 512.394.3001

Attorneys for Defendant
TIME WARNER CABLE INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

MARK SWINEGAR, an individual; and MICHELE OZZELLO-DEZES, an individual; individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TIME WARNER CABLE, INC., and DOES 1 through 1000,

Defendants.

Case No. BC 389755

CLASS ACTION

DEFENDANT TIME WARNER CABLE INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: February 17, 2011
Time: 1:30 p.m.
Dep't: 307
Judge: Hon. William F. Highberger

Action Filed: April 28, 2008
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

ADMINISTRATIVE RULINGS

OTHER

I. INTRODUCTION

The sole claim asserted by Mark Swinegar and Michele Ozzello-Dezes ("Plaintiffs") is that Time Warner Cable Inc. ("TWC") violated the UCL's "unlawful" prong by charging all putative class members rental fees for converter boxes and remote controls not "affirmatively requested by name," in violation of 47 U.S.C. § 543(f). As in other similar suits based on section 543(f), the most fundamental reason for denying class certification is that "individual issues predominate" in determining the threshold question of whether class members "affirmatively requested by name" their rented equipment. *Thibodeau v. Comcast Corp.*, 2010 Phila. Ct. Com. Pl. LEXIS 171, at **12, 17 (C.P. Phil. June 21, 2010) (alleged section 543(f) violations "cannot be resolved without highly individualized inquiries").

Because TWC may comply with 47 U.S.C. § 543(f) by obtaining customers' affirmative requests for rented equipment either in writing *or orally*, 47 C.F.R. § 76.981(a), any determination of whether customers affirmatively requested their rented equipment necessarily implicates each person's oral interactions with TWC. The customer service representative ("CSR") call transcripts produced in this case – which Plaintiffs now strenuously attempt to ignore – confirm that many TWC subscribers did specifically request their chosen equipment package after being told that monthly rental charges apply. For instance, while Plaintiffs dispute whether they individually requested their rented equipment, the record reveals an array of circumstances in which putative class members affirmatively requested their rented equipment under any interpretation of section 543(f), including (among many others):

- Subscribers who call TWC to place an initial order for cable service, or upgrade existing equipment, and *affirmatively choose by name* a standard, DVR, or HD receiver after orally discussing the additional monthly rental charge for the equipment with the CSR. *See, e.g.*, Thayer Decl., Exh. 33 (Call File 0440) at 2; Exh. 12 (Call File 4650) at 1-2, 9; Exh. 15 (Call File 4633) at 1-5; Exh. 9 (Call File 8004) at 3-4; Exh. 13 (Call File 8748) at 1-5; Exh. 14 (Call File 9102) at 1; Exh. 11 (Call File 9787) at 1-2.[1]
- Subscribers who order service online through TWC's website, which requires them to *affirmatively select* by type and quantity the specific converter package by name with applicable rental charges explicitly stated. *See* Exh. 16 (Su Decl.)

[1] Unless otherwise indicated, all exhibits referenced herein are attached as exhibits ("Exh. __") to the Declaration of Amy Thayer ("Thayer Decl.,") filed concurrently herewith.

¶¶ 8-9 & Exhs. G-H thereto.

- Existing subscribers who bring their standard receivers into a TWC office to upgrade their equipment to a DVR or HD receiver who (unlike Plaintiff Swinegar) do not dispute that they *affirmatively requested* that equipment after being advised of the additional monthly rental charge. *See, e.g.*, Exh. 11 (Call File 9787) at 1-2.

Thus, while Plaintiffs urge the Court to ignore subscribers' communications with TWC, determining section 543(f) compliance under any theory "must necessarily involve a customer-by-customer inquiry." *Thibodeau, supra*, at *17; *cf. Deitz v. Comcast Corp.*, 2007 U.S. Dist. LEXIS 53188, at **18-21 (N.D. Cal. July 11, 2007) (recognizing that whether class member affirmatively requested equipment required highly individualized inquiry); *Brissenden v. Time Warner Cable, Inc.*, 2009 N.Y. Misc. LEXIS 2473, at *6 (N.Y. Sup. Ct. Sept. 16, 2009) (whether class members were harmed by any section 543(f) violation demands further individual inquiry).

Plaintiffs have also failed to satisfy their burden on other class certification requirements. They have not demonstrated that their claims are "typical," particularly in light of the individualized nature of the section 543(f) inquiry and their own unique subscription histories. Plaintiffs have not shown that they can "adequately represent" the putative class, especially given that each is subject to unique defenses and other unrepresentative factors implicated by their own circumstances. They have not proved that their proposed class is "ascertainable" without undue time and expense, as the law requires, and in fact their proposed class is illegally overbroad by including countless people with no claim. Finally, Plaintiffs have not satisfied their burden to prove superiority and manageability – they identify no procedural tools to manage and resolve the myriad individual issues underlying each putative class member's claim and entitlement to restitution that would remain after determining any common issues.

Plaintiffs' arguments offered in an effort to escape this inevitable result are unavailing. Their suggestion that TWC's Subscriber Agreement somehow negates 47 C.F.R. § 76.981(a) and prevents considering oral communications even for purposes of determining compliance with 47 U.S.C. § 543(f) is meritless. Likewise, Plaintiffs' argument that the Court can determine on a class-wide basis whether TWC has complied with section 543(f) by considering only TWC's general training materials is contrary to law and the evidence in the record. Indeed, the record

reveals not only wide variance in customer ordering interactions, but also countless examples of putative class members who *have* undeniably "affirmatively requested" their rented equipment and therefore have no claim under any interpretation of what section 543(f) demands.

Accordingly, even though this Court found that there was a disputed issue of fact as to the named Plaintiffs' individual UCL claims based on their testimony that they did not affirmatively request their equipment, this class certification motion implicates individual assessments of each subscriber's communications and orders with TWC to determine whether that person has a viable UCL claim for restitution. TWC expects that the FCC will soon clarify both the governing regulatory interpretation of section 543(f) and that TWC's recommended practices do not constitute illegal "negative option billing" under the statute Plaintiffs borrow for their UCL claim. But even without that ruling by the FCC, Plaintiffs' class certification motion should be denied.

II. BACKGROUND

A. Procedural History.

Plaintiffs allege that TWC violated the "unlawful" prong of California's UCL by charging putative class members rental fees for converter boxes and remote controls that none of them "affirmatively requested by name," in violation of 47 U.S.C. § 543(f). Section 543(f) provides:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

The same language appears in the FCC's implementing regulations, which further clarify that a customer's affirmative request may be obtained either "orally or in writing," 47 C.F.R. § 76.981(a), including "electronically." *In re Implementation of Sections of the [Cable Act], Rate Regulation*, 8 F.C.C.R. 5631, 5905 n.1092 (1993).

Relying on the FCC's regulatory guidance and interpretation to date, TWC maintains that a subscriber's *affirmative assent* (*e.g.*, "yes," "I'll take three," or the equivalent) to an offer of equipment in the context of a customer's order satisfies section 543(f). Such affirmative assent is not a mere "failure to refuse" TWC's proposal to provide such equipment. 47 U.S.C. § 543(f).[2]

[2] This Court ruled that informed consent by subscribers is insufficient to satisfy section 543(f).

Plaintiffs initially agreed that compliance with section 543(f) could be established in various ways, including where a customer "answers affirmatively" when asked by the operator whether he or she wants the named equipment. Exh. 17 (Opp. to TWC Demurrer) at 5. Despite this judicial admission, Plaintiffs then tried to backtrack after they received in discovery recorded customer calls proving that countless customers do precisely that, *i.e.*, answer affirmatively that they wish to proceed with their order after TWC offers subscribers their choice of receiver package by name at disclosed additional monthly rental charges.

Plaintiffs contend that their interpretation of section 543(f) is mandated by the statutory language, but even the plain meaning of "affirmative request" does not require elicitation of specific words by TWC or checked boxes for each service and item of equipment. Rather, the word "request" as used in section 543(f) simply means "ordering" the service and equipment actually available in the form offered by the cable provider. *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1236-37 (2007); *In re Warner Cable Comm'ns*, 10 F.C.C.R. 2103, 2105 (1995) (section 543(f) ensures "subscribers [are] not billed for services that they never ordered"). The word "affirmative" means to affirm in some active fashion, whether by "yes" or equivalent expression of positive intention.[3] Recently, this Court stated that section 543(f) only requires "some kind of affirmative request for converter boxes and/or remote controls." July 29, 2010 Summary Judgment Order at 7. The Court previously agreed that an affirmative request for converter box equipment is secured if customers call TWC to order two additional boxes, are told the monthly rental fee, and say "okay." Exh. 18 (Nov. 19, 2010 Hr'g Tr.) at 18:26-19:9. The Court indicated that it also may be enough for section 543(f) compliance for any customer that orders DVR or HD boxes online from TWC's website, if they affirmatively "pick" a particular converter "in some kind of purchase dialogue" that has "the price shown." *Id.* at 19:10-17.

July 29, 2010 Summary Judgment Order, at 7. Accordingly, TWC is including in this Opposition illustrations of customers who actually used words such as "box, converter, DVR, HD box, or remote." TWC's position continues to be that an affirmative response to a CSR's offer of equipment satisfies section 543(f) and that class certification should be denied because the overwhelming majority of customers have provided such affirmative assent.

[3] *See, e.g.*, RANDOM HOUSE DICTIONARY UNABRIDGED (2011) (defining the adjective "affirmative" to mean "expressing agreement or consent; assenting").

In July 2010, this Court denied summary judgment, finding triable issues of material fact as to whether each Plaintiff "affirmatively requested by name" their equipment where each *denied* having done so, and specifically denied having discussed equipment with the CSR during the ordering process. July 29, 2010 Summary Judgment Order, at 3-4, 7-10. But the Court did not specify what type of subscriber request would satisfy section 543(f), or what "more" than affirmative consent was required. *Id.* TWC then petitioned the FCC for a determination whether a customer's affirmative assent was sufficient, and whether TWC's recommended general practices comply with section 543(f)'s requirements. *See* Exh. 19 (TWC FCC Petition) at 1-2.

Class certification in this case is unwarranted regardless of how the FCC rules on TWC's petition. If the FCC decides that TWC's recommended practices comply with section 543(f), it is apparent that no class may be certified because individual inquiries into whether TWC followed its recommended practices in any given instance would have to be determined on a subscriber-by-subscriber basis. Exh. 20 (Sept. 29, 2010 Hr'g Tr.) at 13:26-14:3. It does not follow, however, that an FCC decision that TWC's recommended practices are insufficient, in whole or in part, would demonstrate that class certification is warranted – especially given the undisputed wide variance in individual ordering experiences and variety of subscriber interactions with TWC revealed in discovery. Plaintiffs are simply wrong when they claim that TWC "has repeatedly asked the Court, and now the FCC, to determine on a class-wide basis, solely by reference to its alleged standardized training policies and sales practices, *its class-wide compliance with § 543(f).*" Op. Br. at 16 (emphasis added). TWC has done nothing of the sort.[4]

B. Putative Class Members Affirmatively Order Equipment In Different Ways.

In multiple ways, TWC subscribers can and do affirmatively request their equipment through a variety of interactions with TWC,[5] including:

[4] As TWC stated in its FCC petition: "TWC is not asking the Commission to determine that each of the countless interactions between its CSRs and customers are the same, or that all of those interactions by themselves comply fully with Section [543(f)]. . . . Indeed, each conversation is unique, and TWC trains its CSRs to respond to the specific interests and questions expressed by the customer, rather than to adhere to a wooden script. TWC is simply asking the Commission to confirm that transactions following TWC's recommended practices outlined herein satisfy Section [543(f)]." Exh. 19 (TWC FCC Petition) at 4 n.9.

[5] The methods of ordering services and equipment from TWC are described at length in the

(1) Online via TWC's website. The website requires subscribers affirmatively to select from a drop-down menu the level of service desired, and then affirmatively to select by name the type and quantity of receiver desired, with monthly rental charges for the applicable equipment explicitly stated;

(2) By telephone with TWC's CSRs. The subscribers and CSRs discuss the service options offered by TWC (whether individually or bundled), and then subscribers affirmatively select by name the type and quantity of receiver/converter equipment they wish to order (*e.g.*, standard, HD, DVR box) after being informed of the additional monthly rental charge for the equipment package selected, which charge includes the chosen converter and accompanying remote control provided to operate the box remotely; and

(3) In person from a TWC employee. In person orders occur in several ways, including (a) at a TWC office where the subscriber discusses with TWC sales agents the various service and equipment options and affirmatively selects by name the type and quantity of receiver equipment after being told of the additional monthly charges for the chosen equipment; and (b) from TWC installers at the point of installation, where many customers alter their initial orders to affirmatively request additional or different converter box equipment after discussing the equipment with the installer. Those charges are reflected on the modified or additional written work order executed by the customer.

See Exh. 16 (Su Decl.) ¶¶ 7-9, 20 & Exhs. G-H thereto; Exhs. 5-15 (Call Files); Exh. 18 (Nov. 19, 2010 Hr'g Tr.) at 18:26-19:17; Exh. 21 (Pemberton Dep. Tr.) at 64:3-67:16; K. Reilly Decl. in Opp'n to Class Cert. ("Reilly Decl."), ¶¶ 5-7; D. Smith Decl. in Opp'n to Class Cert. ("D. Smith Decl."), ¶¶ 3-5, 7; Exh. 23 (Davis Dep. Tr.) at 26:14-24, 57:20-25; N. Colon Decl. in Opp'n to Class Cert., ("Colon Decl.") ¶ 4; R. Roque Decl. in Opp'n to Class Cert. ("Roque Decl."), ¶ 4. Even among these categories, each interaction with TWC can vary materially, as the CSR calls and Plaintiffs' own subscription histories illustrate.

III. ARGUMENT

A. Plaintiffs Have Not Satisfied Their Burdens On Class Certification.

As the parties seeking class certification, Plaintiffs bear the burden to prove by substantial evidence that there is "both an ascertainable class and a well-defined community of interest among the class members." *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913, 922 (2001). The requisite "community of interest" is not established unless Plaintiffs prove that (1) common questions and issues predominate ("predominance"), (2) the proposed class

---

Memorandum of Points and Authorities in Support of TWC's Motion for Summary Judgment and accompanying exhibits, incorporated here by reference.

representatives have claims and defenses typical of the class ("typicality"), and (3) the class representatives and their counsel can adequately represent the class ("adequacy"). *See Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981); *Kaldenbach v. Mutual of Omaha Life Ins.*, 178 Cal. App. 4th 830, 843 (2009). Plaintiffs also must prove that class-wide litigation is "superior" to other methods of adjudication such that class certification "will provide substantial benefits to litigants and the courts." *In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009). In assessing superiority, courts consider whether the nature of the claims and defenses pose "manageability" concerns which further counsel against class-wide litigation of the action. *Washington Mut. Bank*, 24 Cal. 4th at 922; *see also Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1339, 1350-53 (2009) (class action not manageable and not superior where litigation of claims and defenses of named plaintiffs would not establish liability to all and "constitute proof as to all purported class members"). Although the failure to satisfy any one of these requirements would defeat class certification, Plaintiffs have failed to satisfy their burdens on all these requirements.

B. Plaintiffs Have Not Proved That Common Questions Predominate.

Plaintiffs' proposed class includes *every one* of the millions of TWC subscribers in California who ever paid rental fees for cable equipment from April 28, 2004 to the present. Plaintiffs' class-certification motion therefore turns on whether they can prove by class-wide evidence that no TWC subscriber ever "affirmatively requested" the converter box and accompanying remote control equipment rented from TWC. Plaintiffs make no such extreme showing – nor could they. In contrast, the evidence that Plaintiffs ignore confirms that, even under Plaintiffs' theory of the case, countless TWC customers have "affirmatively requested by name" the particular rented equipment, and thus cannot be included in any properly-certified class action. There is no way to determine which putative class members might have viable claims under section 543(f) without a detailed individualized inquiry into the facts and circumstances of each subscriber's interactions with TWC. Because individual issues predominate, class certification must be denied. *See Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096, 1108 (2003); *Kaldenbach*, 178 Cal. App. 4th at 848-50.

1. Individual Issues Predominate Because Whether TWC Subscribers "Affirmatively Requested" Their Equipment Can Only Be Determined On A Subscriber-By-Subscriber Basis.

As one court recently held in denying class certification of an indistinguishable claim based on 47 U.S.C. § 543(f) against another major cable operator:

> Plaintiffs proposed to certify a class of all Comcast basic service subscribers who had a cable box and/or remote control installed during the class period and who paid rental fees for this equipment. As demonstrated by the Representative Plaintiffs, Plaintiff Class' claims cannot be resolved without highly individualized inquiries. *Determining which customers affirmatively requested a converter box and/or a remote control must necessarily involve a customer-by-customer inquiry*. . . . These individual issues predominate over common issues.

Thibodeau, 2010 Phila. Ct. Com. Pl. LEXIS 171, at **16-17 (emphasis added).[6] The same result is compelled here. Whether a customer "affirmatively requested" particular equipment under 47 U.S.C. § 543(f) turns on predominating individual questions relating to the actual facts of each customer's orders and exchanges with TWC's CSRs, installers, and employees. Indeed, because a subscriber's "affirmative request" for services and equipment under section 543(f) may be made either orally or in writing (47 C.F.R. § 76.981(a)), the Court cannot disregard each putative class member's *oral* interactions with TWC employees. The facts and circumstances of each subscriber's order – which vary substantially and are typically oral in nature – confirm the individualized nature of the inquiry at the core of this case.

For instance, the Court itself has indicated that it "would be enough" to establish compliance with section 543(f) as to converter box equipment if an individual subscriber had called TWC and told one of its customer sales representatives that they "want two more boxes" and, after being told the additional monthly charge for the equipment, they said "okay." Exh. 18 (Nov. 19, 2010 Hg. Tr.) at 18:26-19:9. The recorded CSR calls contain numerous examples reflecting this sort of interaction with customers – *i.e.*, subscribers called TWC to order services

[6] In other cases involving section 543(f), courts have denied class certification due to the predominance of individual issues concerning whether subscribers wanted or needed their rented equipment even if some may not have affirmatively requested that equipment. *See Deitz*, 2007 U.S. Dist. LEXIS 53188, at **18-21; *Brissenden*, 2009 N.Y. Misc. LEXIS 2473, at **5-6; *see also Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, at *26 (C.D. Cal. Nov. 24, 2010) (finding individual issues predominated in UCL, FAL and CLRA claims based on misrepresentations to subscribers).

and then chose particular equipment (*e.g.*, standard converters or DVR or HD receivers) after being advised of the additional monthly rental charge for the equipment that they affirmatively ordered in their oral discussion with TWC's CSR.[7] To cite a few examples:

- In Call File 0440, customer Maria calls TWC to order an additional cable box and specifically chooses a standard converter ("regular box") after being told of the applicable monthly charge of "$8.50." Maria confirms "Okay" after the CSR summarizes the order and asks to set up installation. Exh. 33 at 1-2.
- In Call File 9102, customer calls TWC to "set up for a couple of DVRs" to replace two of his existing boxes. After being told that DVR service is "$10 more per box," the customer proceeds with the order. Exh. 14 at 1-4.
- In Call File 5799, customer Marie calls TWC, orders a bundled package, and is told "the monthly charge . . . does not include the rental fees of your cable box." Marie then chooses a DVR box after being told the monthly charge for it is $16.50, and also asks the cost of "an extra one." The CSR tells Marie the monthly price would be "$8.50 for a regular box," and Marie replies, "I see, okay. Well, I'll leave it at one for now." The CSR sets up installation of the one DVR box Marie ordered. Exh. 7 at 5-6.
- In Call File 4650, customer Jason asks whether the new boxes have HDMI connectors and states, "I want an HD DVR." Exh. 12 at 2-6.
- In Call File 8004, customer Brian calls TWC to ask for Internet service, but requests a bundled package after learning that his total monthly cable and Internet cost will be less. Brian then asks about pricing if "I get the HD DVR [recorder] as well" and is told it will be an extra $10.00 per month for DVR service, to which he responds, "Yeah, just do the DVR," and sets up installation. Exh. 9 at 4.

There are many other categories of subscribers who again, under any theory of the case, unquestionably "affirmatively requested" their equipment by name, including: (1) new subscribers who used TWC's website to order and selected either a standard receiver package, DVR package, or HD receiver package from a drop-down menu that lists the additional monthly rental cost for the particular receiver package (which monthly charge includes the accompanying remote control that operates the receiver);[8] (2) existing subscribers who called TWC to upgrade

[7] Notably, Plaintiffs identify no examples of TWC CSRs misrepresenting the monthly charges for service and equipment, nor do they dispute TWC's clear policy and practice of accurately informing customers of the monthly service charge for rented equipment. *See* Exh. 16 (Su Decl.) ¶¶ 15-17, 19 & Exhs. K-N, T-U, W-X thereto. Both TWC's training materials and recorded CSR calls demonstrate that TWC employees, *inter alia*, accurately quote the total price and monthly charges for services and equipment ordered by customers before asking them affirmatively to confirm their order (and most typically "itemize" the cost of equipment as a converter/remote package). *See id.*; *see also* Exh. 21 (Pemberton Dep. Tr.) at 54:12-55:23, 61:16-25, 64:3-5, 65:24-66:19, 72:25-73:12, 78:18-80:25; *see also* Reilly Decl., ¶¶ 3-6; D. Smith Decl., ¶¶ 3-7.

[8] Throughout the putative class period, customers ordering digital cable television services on

from a standard receiver to a DVR or HD receiver, or to add a DVR or HD receiver to their existing order, *see, e.g.*, Exh. 12 (Call File 4650) at 1, 9 (customer said "I want an HD DVR" to replace an old box and affirmed the order after being told it would cost an extra $10 per month); Exh. 13 (Call File 8748) at 2 (customer asking to upgrade her converter box, said "I'm going to need a DVR," and was told it will cost an extra $10 per month); Exh. 14 (Call File 9102) at 1-4 (customer said, "I would like to set up for a couple of DVRs," was told each box would cost $10 extra per month, and said, "Okay"); (3) existing subscribers who brought their standard receivers into a TWC office to upgrade their equipment to a DVR or HD receiver after being told the applicable price, *see, e.g.*, Exh. 11 (Call File 9787) at 1-2 (customer told she could exchange her old converter box for a high definition box, and that the new box would cost the same price in monthly rental charges); (4) subscribers who called TWC to place an initial order for cable television services and who chose a specific number of converters after disclosure of the price of each converter package, *see, e.g.*, Exh. 6 (Call File 2733) at 2-3 (customer ordered a "DVR recorder" for the disclosed price of $16.50 per month); (5) existing subscribers who called TWC to order additional converters after discussing the price of the additional equipment with the CSR, *see, e.g.*, Exh. 33 (Call File 0440) at 1-2 (customer ordered "an additional box, a cable box," and was told "a regular box" would cost an extra $8.50 per month); Exh. 15 (Call File 4633) at 1-2, 5 (customer ordered an extra three digital boxes, and one DVR box after being told each box would cost $8.50 per month and DVR service was $10.00 more per month); (6) subscribers who, at installation, ordered more receivers from the installer or upgraded to an HD or DVR receiver, and were advised of all additional costs and rental charges, *see* Exh. 23 (Davis Dep. Tr.) at 26:14-24,

---

TWC's website chose the type of converter they wanted to order from a drop down menu. *See* Exh. 16 (Su Decl.) ¶¶ 8-9. A subscriber ordering TWC's "Surf N' View" package in 2008 would have selected from a drop down menu either a "digital cable box," an "HD box" or an "HD DVR Box & Service." *Id.*, Exh. G thereto. The $6.50 price listed for the chosen digital cable box included the price of the accompanying remote control. An older version of TWC's website similarly asked subscribers to choose their equipment packages from several options. *Id.*, Exh. H thereto. On TWC's current website, customers can order a Price Lock Guarantee package that includes two HD DVR boxes (with remote controls) and DVR service fee in the quoted monthly price. *See* L. Koester Decl. in Opp'n to Class Cert. ("Koester Decl."), ¶ 5 & Exh. C thereto. The drop down menu automatically fills in the equipment for that offer (two line items for "HD DVR Box and Service") and lists "Included" for the monthly price of the equipment. *Id.*

57:20-25; Colon Decl., ¶ 4; Roque Decl., ¶ 4; and (7) subscribers who, during installation, reviewed the itemized work order line-by-line with the installer, confirmed that the equipment listed was the quantity and type the subscriber affirmatively ordered from the CSR and thereafter signed the itemized work order, *see* Exh. 23 at 15:22-16:3, 41:22-47:15, 56:19-60:9, 58:12-60:1; Exh. 34 (Davis Decl.) ¶¶ 3-5; *see also* Colon Decl., ¶¶ 3-6; Roque Decl., ¶ 3.[9]

Thus, consideration of customers' individual interactions with TWC reveals many who, under any interpretation of section 543(f), affirmatively requested their equipment by name, and thus have no claim for violation of the statute. Such an overbroad putative class of individuals, virtually all of whom have no dispute with TWC and no colorable right to UCL restitution, cannot properly be certified. *See Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 923 (2010) (affirming denial of class certification in "unlawful-prong" UCL case where, *inter alia*, the "proposed class was overbroad because a substantial portion of the class would have no right to recover on the asserted legal claims"); *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 629, 631-32 (2010) (UCL class of "all persons who purchased Listerine" during class period was "grossly overbroad" by including many with no claim).

Moreover, Plaintiffs' overbroad class includes "legacy" Comcast or Adelphia customers who – unlike Plaintiffs (who were both legacy Comcast customers) – continued without change the same service and equipment they had received before TWC acquired their franchise area.[10] Section 543(f) did not require TWC to obtain *renewed* affirmative requests from such subscribers, because it only prohibits charging for service or equipment "not previously provided" unless

---

[9] Even if "the mere act of signing a work order" does not always constitute an affirmative request by name, especially where the given subscriber *denies* having ordered the equipment (*see* July 29, 2010 Summary Judgment Order at 10), the Court never has denied that a customer's executed work order *can* memorialize an affirmative request by name made orally in prior interactions. A customer's verbal confirmation that the order is accurate would independently constitute an oral affirmative request by name for the equipment listed on the work order and reviewed by the installer. Because TWC installers are trained to review each item in the work order and ask the customer whether the order is accurate (*see, e.g.*, Exh. 16 (Su Decl.) ¶ 23; Exh. 23 (Davis Dep. Tr.) at 15:22-16:3, 48:18-51:24, 58:12-60:1; Roque Decl., ¶ 3; Colon Decl., ¶ 3), this is yet another individual inquiry that should preclude class certification.

[10] If Comcast or Adelphia violated section 543(f) before TWC acquired their franchises in August 2006, TWC is not liable for their conduct. *See* Exh. 16 (Su Decl.) Exh. B thereto at ¶¶ 2-9 (describing August 2006 acquisition of Comcast and Adelphia franchises; discharge in bankruptcy of Adelphia liabilities; and exclusion of Comcast liabilities in agreement with TWC).

subscribers "specifically decline" the new items. *In re ML Media Partners, L.P.*, 11 F.C.C.R. 9216, 9221 (1996); *In re Omnicom Cablevision of Ill.*, 18 F.C.C.R. 18807, 18810 (2003); *see also In re Warner Cable Commc'ns*, 10 F.C.C.R. at 2105 (section 543(f) "protects subscribers from receiving what has not been ordered; but it does not mandate cutting off what has been ordered").

The evidence establishes that in the overwhelming majority of instances TWC discloses to subscribers the additional monthly rental charges for the equipment options available, and subscribers affirmatively choose their equipment by type and quantity before finalizing their orders. *See* Thayer Decl., Exh. 5 at 3-5; Exh. 6 at 2-3, 5; Exh. 7 at 2-6, 9-10; Exh. 8 at 2-6; Exh. 9 at 4-6; Exh. 10 at 2-7, 11; Exh. 11 at 1-2; Exh. 12 at 1-2, 5-9; Exh. 13 at 1-5; Exh. 14 at 1-4; Exh. 15 at 1-5; Exh. 21 at 64:3-67:16; Exh. 33 at 1-5. The evidence also establishes that subscribers' decisions to order equipment come in a variety of disparate contexts that implicate distinct individual questions – including, for example, (i) initial decisions to order cable service; (ii) changes in existing service; (iii) upgrades in equipment; (iv) modifications of the number and types of converter boxes; (v) online orders using TWC's website; (vi) telephone orders placed with CSRs; (vii) in-store orders at physical TWC offices and retail locations throughout California; (viii) orders placed during certain promotions which include special pricing and equipment options and all-in pricing; and (x) orders for bulk accounts where some of the equipment rental charges are built into the bulk rate. *See id.*; Exh. 16 (Su Decl.) at ¶¶ 7-20; Exh. 26 (TWC Resp. to Special Rogs.) at pp. 1:17-22, 16:19-22 (addressing bulk accounts); *see also* Koester Decl., ¶¶ 3-5 & Exhs. A-C thereto; T. Rhodes Decl. in Opp'n to Class Cert. ("Rhodes Decl."), ¶ 3 & Exhs. A-B thereto; D. Smith Decl., ¶¶ 4-7; Reilly Decl., ¶¶ 4-6; Roque Decl., ¶ 4; Colon Decl., ¶ 4. Thus, apart from the many categories of subscribers who have no claim under any theory, there are many different types of ordering transactions where analysis of section 543(f) compliance and whether the subscriber *might* have a claim raises distinct individual issues.

2. Plaintiffs' Efforts To Deny The Predominance Of Individual Issues Are Meritless, And Confirm That Class Certification Must Be Denied.

Plaintiffs' primary rebuttal to the dispositive effect of the CSR recordings is a reprise of their failed argument that TWC's integrated Subscriber Agreement prevents any consideration of

oral communications in all contexts, even for purposes of determining compliance with 47 U.S.C. § 543(f). Op. Br. at 13-16; *see also id.* at 2-9. As the Court noted when previously considering this same argument, it "makes sense" that TWC may "comply with 543(f) without necessarily putting it within the four corners of an integrated agreement"; section 543(f) compliance can "be manifested by something that is earlier in time or otherwise outside the terms of an integrated agreement." Exh. 22 (May 14, 2010 Hr'g Tr.) at 65:13-66:1. There is a very obvious difference between TWC's contractual relationship with its customers, which is governed by the terms of the Subscriber Agreement (including the work order), and TWC's separate and independent statutory obligations under the Cable Act. The conversations between its CSRs and customers evidence compliance with the latter, not modification of the former, and are not "superseded" in any way. Indeed, nothing in the Cable Act or California law prevents TWC from demonstrating its compliance with section 543(f) by reference to affirmative requests for equipment made orally or online by its subscribers. The law is clear that an affirmative request under section 543(f) *may* be made either orally, electronically, or in writing. *See* p. 3, *supra* (citing authorities).

Under Plaintiffs' "integrated agreement theory," even if a customer called TWC and stated "I affirmatively request two digital cable equipment packages," TWC would violate section 543(f) by supplying that equipment because the affirmative request was not contained in the customer's Subscriber Agreement. Conversely, even if TWC supplied the equipment without ever discussing it with the customer and then started billing for it, TWC would be in compliance with section 543(f) as long as its integrated Subscriber Agreement had a provision that stated, "Customer affirmatively requests two digital cable equipment packages." Such artificial outcomes contradict the wording and intent of the Cable Act's negative option billing provision and demonstrate the fallacy of Plaintiffs' argument.[11]

[11] Plaintiffs' reliance on *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003) (*see* Op. Br. at 15), is misplaced. *Smilow* involved an integrated cell-phone subscriber contract under which customers would be charged only for calls they "originated" as opposed to "incoming" calls, where the defendant tried to "vary" the terms of its integrated contract by reference to prior oral and other communications where some subscribers may be been told they would be charged for incoming calls and thereby "waived" any claims. *Id.* at 35, 38-39. Here, in stark contrast, TWC does not reference oral communications to vary the terms of its written agreement. Rather, it does so for the entirely different purpose of establishing section 543(f) compliance, which is particularly proper given that affirmative requests under section 543(f) may

Moreover, Plaintiffs are mistaken in arguing that the Court can evade predominating individual issues by focusing exclusively on whether TWC's allegedly "common," "uniform," and "standard" sales practices are sufficient to ensure section 543(f) compliance by eliciting a subscriber's "affirmative request" for converter boxes and remotes. Op. Br. at 6-7, 9-12, 16-17, 20.[12] This argument is refuted by *all* evidence in the record, including the numerous CSR call recordings that reveal not only substantial variance among putative class members but also numerous examples of subscribers that do explicitly and affirmatively request by name the specific equipment they order at a stated and agreed-upon monthly rental charge. *See Kaldenbach*, 178 Cal. App. 4th at 847-50 (despite "uniform" standardized training materials and "scripts," class certification properly denied where evidence revealed "myriad" individualized issues concerning what was actually stated to each class member and whether each sales person followed or departed from training materials in a given case); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1427-28 (2006) (individual issues predominate where, despite "standardized or uniform policy or practice," the actual experiences of class members "varied significantly").

Plaintiffs have failed to prove that common issues predominate over the many

---

be made either orally or in writing. 47 C.F.R. § 76.981(a). Plaintiffs' confused reference to the principle that "all laws" in existence are "incorporated into the contract" (Op. Br. at 14) gets them nowhere, and does not alter the predominantly individualized nature of determining whether a section 543(f) violation occurred as to any given subscriber. While that principle may support reading compliance with statutory duties into a contract (*see* 1 Witkin, *Summary of California Law, Contracts* § 752 (2005)), it does not mandate that TWC recite a subscriber's "affirmative request by name" in every Subscriber Agreement to comply with section 543(f).

[12] Plaintiffs fasten upon a *sample* dialogue TWC uses to train its customer service representatives. *See* Op. Br. at 6, 9-10 (citing Johnson Decl.). But that document is only a training aid that contains blanks for prices, as well as services and dialogue un-tethered to any real-life customer interaction. *See* Exh. 24 (Johnson Decl.), ¶ 17 & Exh. 1 thereto. It is not a script recited verbatim by CSRs. *See* Exhs. 5-15, 33; Exh. 21 (Pemberton Dep.) at 42:15-43:21; *see also* Reilly Decl., ¶¶ 3-6; D. Smith Decl., ¶¶ 3-7. Plaintiffs also distort this Court's summary judgment ruling in an effort to avoid the many individualized issues that define their case. Op. Br. at 16-17. The Court denied summary judgment because it found a triable issue of fact regarding whether Swinegar affirmatively requested his equipment by name, where one call recording demonstrated that the CSR who took Swinegar's order deviated from her stated usual practice of disclosing separate rental charges for equipment. July 29, 2010 Summary Judgment Order at 8-9. Plaintiffs try to use this single call recording to prove that *no* TWC CSRs obtain subscribers' affirmative request for equipment after disclosure of the specific monthly charges for equipment as opposed to an aggregate single price for equipment and services. But the Court's finding that a single call recording created a triable issue on summary judgment with respect to Plaintiff Swinegar does not establish that all CSRs follow the same pattern that Swinegar's CSR articulated or followed.

individualized issues that must be assessed to decide whether putative class members affirmatively requested their rented equipment in a manner that complies with section 543(f). *See Block v. Major League Baseball*, 65 Cal. App. 4th 538, 544-45 (1998) ("the issue is not simply whether common questions of law or fact exist but whether they *predominate*"). As the California Supreme Court has held, "each member" of the putative class "must not be required to individually litigate numerous and substantial questions to determine his []right to recover following class judgment" on the allegedly common issues. *Lockheed Martin Corp.*, 29 Cal. 4th at 1108; *accord Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993). Indeed, a "class action will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Keller v. Tuesday Morning, Inc.*, 179 Cal. App. 4th 1389, 1397 (2009).

Here, even if some preliminary issues raise common questions that might be answered on a common basis, such as whether TWC's recommended practices are sufficient in themselves and in the abstract to elicit an affirmative request by name under section 543(f) (Op. Br. at 10), that would not establish TWC's liability to all putative class members, nor each subscriber's right to UCL restitution. Rather, as to each putative class member, the Court would then still need to assess whether, under the particular facts of that person's interactions with the cable provider, the person did specifically request by name the equipment package that he or she was provided and rented after being fully informed of the additional monthly rental fee. *See, e.g., Ali*, 176 Cal. App. 4th at 1347, 1349-50 (certification improper where, despite some common issues, "variations in proof of harm require individualized evidence"); *Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th 110, 120 (2003) (despite some common issues, certification improper where putative class members' entitlement to monetary relief must be established on case-by-case basis). For instance, even if a subscriber's assent to equipment after being informed of the additional monthly rental charge is held not to satisfy section 543(f), the Court would then still need to examine each subscriber's oral and other interactions with TWC's CSRs and installers to determine whether the person did something more that evidences an "affirmative request" by name, which many subscribers plainly did. *See, e.g.*, Exh. 9 (Call File 8004) at 3-4; Exh. 11 (Call

File 9787) at 1-2; Exh. 12 (Call File 4650) at 1-5; Exh. 14 (Call File 9102) at 1-5; Exh. 15 (Call File 4633) at 1-5; Exh. 33 (Call File 0440) at 2; *see also* Reilly Decl., ¶¶ 4-6; D. Smith Decl., ¶¶ 4-7; Colon Decl., ¶ 4; Roque Decl., ¶¶ 4-5.[13]

3. The Proposed "Remote" Subclass Does Not Alter The Predominance Of Individual Issues, And Raises More Individual Questions.

Given that individual issues predominate as to whether putative class members affirmatively requested "converter box" equipment by name, Plaintiffs alternatively propose a subclass focusing only on "remote controls." But this effort does not escape the predominance of individualized issues, and merely raises additional individual issues.

Plaintiffs continue to mischaracterize the evidence in asserting that TWC customers "pay an *extra* monthly fee for *remotes*." Op. Br. at 9, 12 (emphases added). They do not. In fact, customers affirmatively request equipment packages (which include both converter boxes and remotes), and are charged the exact same price for the packages as quoted to them by the CSR.[14] Customers do not pay any more for their remote control even if *some* customers' bills include a parenthetical explanation of the components that are included in the equipment packages the customer ordered. For example, some of Swinegar's statements list "Digital Box and Remote . . .

---

[13] And even if the Court were to accept Plaintiffs' invitation to decide in the abstract whether TWC's training practice guidelines fail sufficiently to comply with section 543(f), it would then need to assess (as it did on summary judgment) whether the facts applicable to each putative class member follow or deviate from such general practices. *Kaldenbach*, 178 Cal. App. 4th at 857-50.

[14] It is undisputed that CSRs quote the *total price* of the receiver package (including the remote) to customers during the ordering process, and any separate itemization of the remote occurs only on the monthly bill later – long after the customer agreed to the entire package price for his or her affirmatively requested receiver package, and also accepted installation of the equipment, including a physical demonstration of the remote's operation. *See* Exhs. 5-7, 10, 14-15; Exh. 21 (Pemberton Dep. Tr.) at 99:1-22, 103:8-106:18, 117:15-118:10; Exh. 25 (A. Smith Dep. Tr.) at 133:4-5, 135:6-13 (explaining that price she quotes subscribers for converters includes the remote control, and that "to the best of her ability" she tries to inform subscribers that remotes come with converters); Exh. 38 (Su Dep. Tr.) at 233:2-22; *see also* Reilly Decl., ¶ 3; D. Smith Decl., ¶ 3; Koester Decl. ¶ 7 & Exh. E ($6.50 price quoted by CSRs in 2009 was price of digital receiver package, including remote control, as evidenced by price lists; $16.50 was price of a primary DVR receiver package, including remote control and DVR service fee). Installers demonstrate the remote during the installation. *See* Exh. 23 (Davis Dep. Tr.) at 45:18-23; 59:21-60:9; Exh. 34 (Davis Decl.) ¶ 4; Roque Decl., ¶ 3; Colon Decl., ¶ 3.

$4.24," while others list "Digital Cable Receiver (Includes Remote Control at $.23) . . . $4.24." Exh. 16 (Su Decl.) ¶ 24 & Exh. II thereto at TWC_SWIN 36, 50. A parenthetical in that same bill informs Swinegar that the "Surf N' View Extreme" package he ordered "[i]ncludes: Digital Cable (Basic @ $7.89, Standard Cable, 1 Digital Tier), Road Runner High Speed Online Extreme." *Id.* at TWC_SWIN 50. This explanatory itemization, which also is sometimes included for independent and unrelated regulatory purposes (*see, e.g.*, 47 C.F.R. §§ 76.923(b), 76.1206, 76.1619), does not change the amount Swinegar is being charged for the "Surf N' View Extreme" package he affirmatively ordered. Rather, the line item charge is exactly the price he was quoted when affirmatively ordering the service. The same is true of the equipment package. These parenthetical explanations of the various elements that make up the package of services or equipment the customer ordered are not "extra charges." *See also* Koester Decl., ¶¶ 3-6 & Exh. D thereto.

Thus, apart from the fact that the evidence reveals that some subscribers have explicitly discussed and affirmatively requested remote controls by name from a CSR or from an installer (*see* Exh. 11 (Call File 9787) at 2; Roque Decl., ¶ 5; Reilly Decl., ¶ 7), the same individual issues that predominate as to converter boxes carry over to remote controls because the stated and agreed-upon monthly rental charge for a customer's chosen converter box *includes* the accompanying remote control. Thus, where a customer agreed to pay an additional monthly charge of $6.50 for the particular equipment package he chose (and thus affirmatively requested by name), that amount included the accompanying remote, regardless of whether the customer's monthly bill explains the amount of the single charge attributable to the remote for unrelated regulatory purposes. In this way, the customer's affirmative request for the chosen converter box at the stated price satisfies section 543(f) as to the entire converter package, including its accompanying remote. *See Belton*, 151 Cal. App. 4th at 1236-37 (subscriber who orders package of services and equipment by name has affirmatively requested all components of package).

Even if this were not the case, Plaintiffs' "remote" subclass itself implicates additional individual inquiries, including a careful and detailed assessment of each subscriber's ordering circumstances and billing statements to determine if he or she was even charged separately for

equipment. Depending on when and how a putative class member ordered services, the individual may have received the equipment (including the remote) without separate charge in a bundled package at a single all-in price point that includes all equipment.[15] Or the individual may have ordered services and equipment on TWC's website, which offers receiver packages for a stated monthly rental charge that includes any cost attributable to a remote control, and asks subscribers to affirmatively select the type and quantity of receiver package they wish to order.[16]

In addition, many class members will have ordered an "additional outlet" with a single price point that includes the converter, remote, and a digital programming fee. These individuals lease a bundled equipment package that includes the remote control, and TWC discloses and then charges a "digital programming fee" for more than one digital receiver – and the amount of such fees has varied over time. *See* Exh. 26 (TWC Resp. to Spec. Rog.) no. 184. TWC establishes the fee on an unbundled basis in accordance with 47 C.F.R. § 76.923(b), and references it on billing statements. *See* Koester Decl., Exh. D thereto. This does not implicate section 543(f), which does not require TWC to ask subscribers if they "affirmatively request" the various charges that make up the service or equipment package they are ordering by name; rather, section 543(f) at most requires TWC to ask subscribers only whether they want additional digital outlets at the offered price, which includes the digital programming fee. As the FCC has ruled, cable providers may charge additional outlet fees, and the amount of such fees charged only to digital tier subscribers is not subject to regulation by local franchising authorities. *In re Comcast of Dallas, L.P.*, 20 F.C.C.R. 5892 (2005); *In re Comcast Cablevision of Dallas, Inc.*, 19 F.C.C.R. 10628 (2004).

C. Plaintiffs Have Not Proved That Their Claims Are "Typical" Of The Putative Plaintiff Class Or That They Can Adequately Represent The Class.

1. Neither Of The Named Plaintiffs Is Typical Of The Class.

Plaintiff's claims are not "typical" of the claims of all the putative class members. Given the multiple categories of ordering scenarios, and many instances where class members have

[15] *See* Koester Decl., ¶¶ 3-4 & Exhs. A-B thereto; Rhodes Decl., ¶ 3 & Exhs. A-B thereto.
[16] Exh. 16 (Su Decl.) ¶¶ 8-9 & Exhs. G-H thereto; Koester Decl., ¶ 5 & Exh. C thereto.

specifically requested the rented equipment by name, the individualized nature of this UCL claim based on section 543(f) prevents Swinegar and Dezes from having claims and applicable defenses "typical" of their proposed class and subclasses, as they are not "situated similarly" to all class members as to the fundamental issue in the action. *Caro*, 18 Cal. App. 4th 644 at 664-66. While Plaintiffs now contend that "it would be illogical to believe that TWC's employees treated the named Plaintiffs here any differently than they were trained to treat every other customer" (Op. Br. at 11), their own testimony shows that they are claiming exactly that – *i.e.*, despite TWC's general practice of informing customers of the need for and cost of equipment before processing any orders, the CSRs who processed both Swinegar's and Dezes' orders did not mention equipment at all.

Swinegar is a legacy Comcast subscriber who continued to subscribe to the same level of service and retain the same equipment after TWC acquired his franchise area, until Swinegar's account was terminated by TWC for non-payment. In September 2007, Swinegar telephoned to re-establish service and affirmatively requested the "Surf N' View" package he had seen in a TWC promotional flier. *See* Exh. 27 (Swinegar Dep. Tr.) at 70:8-74:1, 81:15-18, 108:22-109:1. Although Swinegar denies that the disclosure was made, the CSR taking Swinegar's order declared that, consistent with her usual practice, she would have disclosed to Swinegar the additional charges for the equipment he ordered with his bundled package. *See* Exh. 28 (A. Smith Decl.) ¶¶ 3-8. The TWC installer also provided Swinegar with TWC's Welcome Kit and Subscriber Agreement, reviewed every cost item in the work order, and demonstrated operation of the converter box and remote. Exh. 27 (Swinegar Dep. Tr.) at 78:23-25, 79:19-24; Exh. 34 (Davis Decl.) ¶¶ 3-4. Swinegar admits he signed a "receipt," which was his executed work order. Exh. 27 at 79:19-80:6, 85:20-86:14; Exh. 16 (Su Decl.) ¶ 21 & Exh. CC thereto (TWC_SWIN 553). Since then, Swinegar has paid all of his TWC bills, each of which separately itemizes the charges for his equipment. After buying an HD television, Swinegar contacted TWC to find out why he could not see HD channels and was advised he needed an HD converter to do so. Although Swinegar took his old box to TWC's offices to switch converter boxes and obtain his desired HD converter, he disputes whether he "affirmatively requested" the HD converter. *See*

Exh. 27 (Swinegar Dep. Tr.) at 83:8-84:7; Exh. 29 (Swinegar Response to Special Rog. No. 1). On summary judgment, the Court found a disputed issue of fact because Swinegar denied that he affirmatively requested the HD converter and stated that he thought the HD receiver was "free." July 29, 2010 Summary Judgment Order at 9-10.

Dezes is also a legacy Comcast subscriber who continued to use the same services and equipment, and was billed in the same manner and at the same price, after TWC acquired her franchise area. Exh. 16 (Su Decl.) ¶ 25 & Exh. JJ thereto at TWC_SWIN 433-42. In September 2007, Dezes called TWC to add Internet service. Exh. 31 (Dezes Dep. Tr.) at 41:10-42:3, 44:4-11, 44:12-16, 45:20-24. TWC upgraded Dezes to the bundled Surf N' View package, which gave her Internet service but did not change her cable service or equipment. The bundled package cost Dezes less than she would have paid had she simply added Internet service to her existing package. Exh. 16 (Su Decl.) ¶¶ 28-29. The technician who visited Dezes' home to install her new package provided Dezes with a work order, which set forth the separate charges for her then-existing equipment (two digital receivers and two remote controls) and the new services (the components of the Surf N' View bundle). *Id.*, (Su Decl.) ¶ 21 & Exh. DD thereto. Dezes signed the work order, and six days later, TWC mailed Dezes a bill that separately itemized and charged her for two converters and remotes. Exh. 31 (Dezes Dep. Tr.) at 31:2-17, 56:2-12; Exh. 16 (Su Decl.) ¶ 24 & Ex. JJ thereto at TWC_SWIN 462. Dezes was "comfortable" with the amount of that first bill (Exh. 31 (Dezes Dep. Tr.) at 46:12-47:3), and paid it and all subsequent TWC bills. Exh. 16 (Su Decl.) ¶ 24 & Exh. JJ thereto at TWC_SWIN 464-468.

Thus, both named Plaintiffs have highly idiosyncratic subscription histories that further undermine any finding of typicality. Both were Comcast legacy subscribers who kept the equipment provided to them by Comcast when TWC acquired their franchises in 2006, and premise their claims on subsequent changes in their service and equipment packages. Their claims rest on denials of whether they were informed that they would be charged for their rented equipment, not on whether they even ordered the equipment itself. Because adjudicating whether Dezes and Swinegar "affirmatively requested" their rented equipment does nothing to prove

whether any (much less all) class members did so, Plaintiffs cannot be deemed "typical." *See Deitz*, 2007 U.S. Dist. LEXIS 53188, at **10-11.

Further still, although Plaintiffs seek restitution on the claim that neither "affirmatively requested by name" their rented equipment, neither Swinegar or Dezes have ever returned the equipment at issue – nor have they otherwise modified, much less cancelled, their TWC subscriptions after filing suit. Thus, neither is "typical" of any putative class members who might have a viable restitution claim for being charged rental fees for equipment they never affirmatively ordered – *i.e.*, people who reasonably would be expected to reject and return such purportedly un-ordered equipment once they realized they had to pay extra for it. The disparate facts applicable to Swinegar and Dezes implicate multiple defenses that are unique to them, which would not be shared by putative class members who might have valid claims that they have been charged rental fees for equipment that they never ordered.[17] This further precludes any finding of typicality here. *See Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007) ("named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representation is preoccupied with defenses unique to it") (internal quotation marks omitted); *Deitz*, 2007 U.S. Dist. LEXIS 53188, at *13 (named plaintiffs not typical when "major focus of the litigation will be on . . . defenses unique" to them); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (unique defenses applicable to named plaintiff defeat typicality).

2. Neither Of The Named Plaintiffs Is An Adequate Class Representative.

Nor can Swinegar or Dezes be deemed "adequate representatives" of the proposed class. As described above, both have interests in conflict with the class (*Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007)), and neither has sufficient knowledge of the issues or independence from Plaintiffs' counsel to serve as fiduciaries for the class. *Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1265-66 (2005); *Earley v. Superior Court*, 79 Cal.

[17] TWC has affirmative defenses of unique application to Plaintiffs, including Affirmative Defenses Eight (benefit of bargain), Nine (voluntary payment), Twelve (consent), Thirteen (failure to mitigate), Fifteen (damages speculative/impossible to allocate), Sixteen (equitable estoppel), Seventeen (laches), and Nineteen (waiver). *See* Exh. 30 (TWC Answer to SAC).

App. 4th 1420, 1434 (2000).[18] In fact, both have personal relationships with their proposed class counsel equivalent to those that courts in other section 543(f) cases have held to negate adequacy. *See, e.g., Brissenden*, 2009 N.Y. Misc. LEXIS 2473, at *7 (class representatives deemed inadequate in section 543(f) case where he was brother-in-law to plaintiffs' counsel, who appeared to be "motivating force" behind the lawsuit); *Deitz*, 2007 U.S. Dist. LEXIS 53188, at *14 (class representative who was plaintiff counsel's friend since college was an "inappropriate named plaintiff"). Dezes has been friends with counsel Douglas Caiafa for "about twenty years," works in the same office suite as he does as a paralegal, and became involved in the case only after hearing Caiafa talk of the suit at work; Swinegar became involved after a "dinner" organized by Maria De Santiago, a close friend of Plaintiffs' other counsel Christopher Morosoff, who appears to be the motivating factor behind Swinegar's involvement.[19] Prior to that meal, Swinegar had no complaint with TWC. Exh. 27 (Swinegar Dep. Tr.) at 31:13-32:9.

D. Plaintiffs Have Not Proved That Their Proposed Class And Subclasses Are Reasonably Ascertainable.

Plaintiffs also have not met their burden to establish that their proposed class definition "is precise, objective and presently ascertainable" (*Global Minerals & Metals Corp.*, 113 Cal. App. 4th 836, 858 (2003) (internal quotation marks omitted), and that class members "'may be readily identified without unreasonable expense or time by reference to official or business records.'" *Sevidal*, 189 Cal. App. 4th at 919 (citations and internal brackets omitted).[20] Plaintiffs' proposed

---

[18] For instance, Dezes did not meet with her attorneys between September 2008 and May 2009, did not review the First Amended Complaint, and only read the first page of the Second Amended Complaint. Exh. 31 (Dezes Dep. Tr.) at 51:2-13, 63:5-64:13, 65:1-66:4. Swinegar did not review the original complaint before filing and did not know how the proposed class is defined. Exh. 27 (Swinegar Dep. Tr.) at 37:4-10, 101:1-13. Nor did he attend the mediation in October 2010, despite being available. *See* Swinegar Decl. in Support of Op. Br., at ¶ 3.

[19] *See* Exh. 31 (Dezes Dep. Tr.) at 50:9-51:13, 65:3-15; Exh. 39 (Dezes Resp. to Special Rog. no. 20); *see also* Exh. 27 (Swinegar Dep. Tr.) at 29:11-22, 30:5-14, 31:2-20, 121:7-12, 126:5-12; Exh. 32 (De Santiago Dep. Tr.) at 22:14-21, 26:1-14, 56:1-57:25.

[20] Plaintiffs also have not proved that their proposed class can be readily identified without unreasonable expense and time by reference to TWC's business records. They assert without explanation that TWC's "records" show which subscribers "paid a rental fee to TWC for either a converter or a remote during the Class Period" (Op. Br. at 19), but the facts are otherwise. Like the proposed class held not to be ascertainable in *Sevidal* because Target's business records did not permit ready identification of persons in the proposed class, TWC's records do not enable identification of all putative class members. TWC provided "snapshots" of the total *number* of

class is "grossly overbroad" by including individuals who even under Plaintiffs' theory of the case *did* affirmatively request converter boxes and accompanying remotes in compliance with section 543(f), and thus "clearly are not entitled to restitution[]." *Pfizer*, 182 Cal. App. 4th at 631; *Akkerman v. Mecta Corp., Inc.*, 152 Cal. App. 4th 1094, 1101 (2007) (affirming denial of class certification where overbroad class included many not entitled to restitution). Plaintiffs' proposed class would afford many with no claim "a windfall award of restitution," which is impermissible. *Akkerman*, 152 Cal. App. 4th at 1101. The proposed class is also "too amorphous for certification," *id.* at 1101, because determining which individuals may properly be included in the class "would require 'answering numerous individualized fact-intensive questions'" – including the type of equipment rented by each subscriber, how they ordered that equipment, who said what to whom, whether they requested the equipment by name, and whether they were informed of the separate charges for that equipment at any stage of the ordering or installation process. *Deitz*, 2007 U.S. LEXIS 53188, at **25-26; *Akkerman*, 152 Cal. App. 4th at 1101; *see also Evans v. Lasco Bathware, Inc.*, 178 Cal. App. 4th 1417, 1422 (2009) ("The ascertainability of members of the class recedes as the right of each individual to recover becomes increasingly dependent on a separate set of facts applicable only to the individual").

E. Plaintiffs Have Not Proved That Class-Wide Litigation Is Feasible, Judicially Manageable, And Superior To Other Available Methods Of Adjudication.

Given the myriad individual issues that must be addressed to determine section 543(f) compliance as to each putative class member, Plaintiffs cannot prove this case is judicially manageable as a class action. *See, e.g., Ali*, 176 Cal. App. 4th at 1353 ("when individual issues of fact predominate over common issues, as here, a class action would be extremely difficult to manage") (internal quotation marks omitted). Indeed, any litigation of their UCL claim will necessarily splinter into numerous mini-trials over whether each subscriber affirmatively

---

digital receivers rented in a particular division on a particular day, the total *number* of subscribers, and of the total *number* of DVR or HD households – but TWC cannot readily generate any list of subscribers *by name* with the corresponding equipment rented, or the amount paid for that equipment, throughout the class period. *See* Exh. 38 (Su Dep.) at 74:18-75:17; Exh. 26 (TWC Resp. to Special Rog.) nos. 142-147; Exhs. 36-37 (correspondence with D. Caiafa); Wolf Decl. in Opp'n to Class Cert., ¶¶ 3-7.

requested his or her equipment by name, and determining anyone's right to equitable restitution demands further individualized assessments. Those individual questions at the core of this case cannot simply be ignored or lost in the throng of class-wide litigation. Here, "questions respecting each individual class member's right to recover" are "so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class certified on such a basis advantageous to the judicial process and the litigants." *Ali*, 176 Cal. App. 4th at 1353; *see also Washington Mut. Bank*, 24 Cal. 4th at 913-14. As a result, any determination of TWC's liability would "splinter the class into thousands of minitrials and largely defeat the benefits of proceeding as a class action." *Evans*, 178 Cal. App. 4th at 1434 (affirming denial of class certification where individualized issues if liability and damages rendered class action "infeasible"); *accord Hernandez v. Chipotle Mexican Grill, Inc.*, 189 Cal. App. 4th 751, 765-66 (2010).

Moreover, Plaintiffs have offered no way for the Court to "effectively manage" and resolve all of the individual issues that would remain for adjudication after resolution of common issues – which must individually be determined before TWC's liability to any putative class member is established. *Dunbar*, 141 Cal. App. 4th at 1432 (affirming denial of class certification where plaintiff failed to propose concrete methods for managing the class); *Hernandez*, 189 Cal. App. 4th at 758, 765-66. Nor have Plaintiffs demonstrated how the proposed Plaintiff Class could be managed consistent with TWC's "due process right" to defend itself on a subscriber-by-subscriber basis by, for instance, demonstrating that it complied with section 543(f) on the particular facts applicable to any given class member. *Lockheed Martin Corp. v. Superior Court*, 79 Cal. App. 4th 1019, 1028 (2000), *aff'd*, 29 Cal. 4th 1096 (2003).

The fundamental manageability problems here are only compounded when the Court considers the additional individual issues implicated in any determination whether a given subscriber is entitled to equitable restitution, and in what measure, on the facts of that person's case. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 180 (2000) ("A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute"). As the FCC has recognized in administering section 543(f), there are instances in

which no restitutionary relief is warranted even in circumstances where no affirmative request by name for a remote control device was sufficiently secured. *See In re Monmouth Cablevision*, 10 F.C.C.R. 9438, 9440-41 (1995). Likewise, to assess any individual's entitlement to restitution of rental fees paid for equipment, the Court would properly need to consider many individual questions – including whether the person needed the equipment to obtain his or her level of service, the value of the equipment to that individual in comparison to the rental charge paid, whether the person would have rented the equipment had the rental charge been more fully disclosed, whether the violation actually resulted in any losses to the plaintiff, and how TWC's equitable and other defenses apply to the facts and circumstances of that individual's case. *See, e.g., Deitz*, 2007 U.S. Dist. LEXIS 53188, at **13; *Brissenden*, 2009 N.Y. Misc. LEXIS 2473, at **8-9; *Thibodeau*, 2010 Phila. Ct. Com. Pl. LEXIS 171, at **14, 16-17; *see also Olson v. Cohen*, 106 Cal. App. 4th 1209, 1214-15 (2003) (declining to order restitution of fees for UCL violation because the remedy would have been "disproportionate to the wrong").

In sum, Plaintiffs' failure to demonstrate how the Court could manage the "numerous and substantial" individual issues that must be adjudicated before TWC's liability to each putative class member (and his or her right to restitutionary recovery) is established provides an independent basis upon which class certification must be denied. *Ali*, 176 Cal. App. 4th at 1353.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' class certification motion should be denied.

Dated: January 18, 2011

Respectfully submitted,

DECHERT LLP

By: _____
H. Joseph Escher, III

Attorneys for Defendant TIME WARNER CABLE INC.